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IN THE SUPREME COURT OF THE UNITED STATES

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MONROE ACE SETSER, :

Petitioner :

v. : No. 10-7387

UNITED STATES. :

- - - - - x

Washington, D.C.

Wednesday, November 30, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

JASON D. HAWKINS, ESQ., Assistant Federal Public Defender, Dallas, Texas; for Petitioner.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for Respondent, in support of Petitioner.

EVAN A. YOUNG, ESQ., Austin, Texas; for amicus curiae, in support of the judgment below; appointed by this Court.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-7387, Setser v. United States.

Mr. Hawkins.

ORAL ARGUMENT OF JASON D. HAWKINS

ON BEHALF OF THE PETITIONER

MR. HAWKINS: Mr. Chief Justice, and may it please the Court:

This case concerns whether, in passing the Sentencing Reform Act of 1984, Congress granted to the Federal district court the authority to order a Federal sentence to run consecutively to a -- a sentence which has yet to be imposed and may never come to fruition. The text of 3584, its structure, and its history all point to the conclusion that the court lacks this power.

We believe the question should start and end with the statute's text. When a defendant receives multiple terms of imprisonment, they must bear one of three relationships to each other. Either one is imposed before the other, the other is imposed before the one, or they are imposed at the same time.

In --

JUSTICE SOTOMAYOR: Counsel, in the third

1 sentence of this provision, on its face, does Mr. Setser
2 fit into it?

3 MR. HAWKINS: No, Your Honor. He does not.

4 JUSTICE SOTOMAYOR: "Multiple terms of
5 imprisonment imposed at different times run
6 consecutively." What's unclear about those words?

7 MR. HAWKINS: Your Honor, that term can
8 only --

9 JUSTICE SOTOMAYOR: The words are not
10 unclear. We have to do the statutory interpretation
11 that you want?

12 MR. HAWKINS: Your -- Your Honor, the words
13 can only be read in the context of the first -- of the
14 first sentence. We believe that the third sentence only
15 applies where the Court had the authority to actually
16 order this but remained silent.

17 JUSTICE SOTOMAYOR: Some fairly respected
18 jurists below, Judge Easterbrook and Judge Fletcher, two
19 different circuits, have read it as taking care of all
20 those situations that the other two sentences don't
21 cover. Why is that an irrational reading?

22 MR. HAWKINS: Your Honor, I -- I think it
23 has to be read -- the third sentence has to be read in
24 its place within the statute, and I think that the third
25 sentence refers exclusively to circumstances where the

1 defendant was already serving another term of
2 imprisonment at the time of the Federal sentencing. And
3 I think we know this because of the parallel structure
4 of 3584(a). It --

5 JUSTICE SOTOMAYOR: But that assumes the
6 answer, is what I'm saying to you. If you give each
7 sentence its plain meaning, why is -- why is Mr. Setser
8 not within the plain meaning of the third? He -- he had
9 multiple terms of imprisonment imposed at different
10 times.

11 MR. HAWKINS: Yes, but those terms of
12 imprisonment weren't -- there was no term of
13 imprisonment imposed at the time of his Federal
14 sentencing. He was not serving an undischarged term of
15 imprisonment. And we believe that the natural flow of
16 the statute -- the default rule only comes in place if
17 the court has the power to sentence under the first
18 sentence --

19 JUSTICE KENNEDY: You would say that at the
20 time of sentencing, there were no multiple terms of
21 imprisonment; is that your point?

22 MR. HAWKINS: That is correct, Your Honor.
23 At the time of the Federal sentencing, Mr. -- Mr. Setser
24 was not subject to an undischarged term of imprisonment.

25 JUSTICE GINSBURG: What difference does it

1 make for him? Now, he served his State time. He came
2 over to serve his Federal sentence. He didn't get
3 credit for the 2-1/2 years he spent in -- in the State.
4 But what is the consequence? How much -- what is the
5 difference to the defendant in this case?

6 MR. HAWKINS: Your Honor, we -- we believe
7 that the order -- what the order did was bind the court.
8 I'm sorry. The -- the order bound the Bureau of
9 Prisons. And so, what it does -- what happens is Mr.
10 Setser is not able to petition the Bureau of Prisons to
11 allow that sentence to begin running from the time of
12 the Federal sentencing. And so, the difference, Your
13 Honor, is 1 year, 6 months, and 23 days that we believe
14 that he is entitled to credit for.

15 JUSTICE ALITO: And this is --

16 JUSTICE GINSBURG: Entitled to credit or you
17 could seek it? I mean, what wouldn't -- he has the
18 State time and he -- 2-1/2 years, and then he has his
19 Federal sentence. Why would you be entitled to any
20 credit?

21 MR. HAWKINS: Because -- because, Your
22 Honor, the court ordered that the -- the Federal
23 sentence to run concurrently to that 10-year sentence
24 that he received in State court. And so, we believe he
25 is entitled to credit for that -- for that sentence.

1 JUSTICE ALITO: In situations like this,
2 somebody is going to have to make the decision whether
3 the Federal sentence and the subsequently imposed State
4 sentence run concurrently or consecutively. And now
5 you're arguing that that should be done by the Bureau of
6 Prisons. Do you think in general that is better for
7 defendants than a rule that would allow the sentencing
8 judge in Federal court to make that determination?

9 MR. HAWKINS: Your Honor, in our estimation
10 the question is not the who, but the when. And at the
11 time, at the Federal sentencing, the Federal judge did
12 not have the complete information to make the proper
13 judgment in this case. He had no idea what that State
14 term of imprisonment was going to be. So, in our
15 estimation, it is better that -- that the Bureau of
16 Prisons has all the information to make this decision.
17 It will actually know what the State term of
18 imprisonment is.

19 I'm not here to advocate that the system
20 that the Bureau of Prisons uses -- uses is perfect.

21 JUSTICE ALITO: Why would the -- why would
22 the exact length of the sentence imposed by the State
23 court be relevant to the determination made by the
24 sentencing judge? I thought the sentencing judge's
25 reasoning was that the -- the undischarged term of

1 imprisonment that was going to be imposed on the offense
2 for which probation had previously been granted and
3 there had been a violation of the probation, that that
4 had nothing to do with his subsequent Federal drug
5 charges, and, therefore, the Federal drug charges should
6 run consecutively to that but should be concurrent to
7 any sentence imposed by the State court on the State
8 drug charges.

9 What -- you know, what's wrong with that
10 reasoning, and what additional insight relevant to that
11 reasoning would be obtained by waiting until after the
12 sentence was imposed?

13 MR. HAWKINS: Well, Your Honor, at the time
14 that the Federal judge passed this sentence, he had no
15 idea what was going to happen in either case. But more
16 importantly, with regard to the term of probation, the
17 Federal judge had no idea whether that term was going to
18 be revoked, whether it would be modified, or whether he
19 would receive any sentence of -- of imprisonment at all.

20 And in making the judgment on whether those
21 terms should run concurrently or consecutively, Your
22 Honor, 3584(b) directs the court to look at the factors
23 of 3553(a) in making that determination. And it would
24 be impossible to make that determination under 3553(a)
25 whether the sentence is adequate to deter, whether that

1 sentence protects the public, without knowing what that
2 State term of --

3 JUSTICE ALITO: Well, that's interesting.

4 MR. HAWKINS: -- imprisonment actually is.

5 JUSTICE ALITO: Do you think that the Bureau
6 of Prisons is bound by those factors when they make the
7 decision later?

8 MR. HAWKINS: Your Honor, the -- the Bureau
9 of -- of Prisons is bound by the factors of 3621(b), and
10 several of those factors match up with the factors in
11 3553(a). It has to look at the nature and circumstance
12 of the crime, the characteristics of the defendant. It
13 has to look to the United States Sentencing Guidelines,
14 and it also has to take in the view of what the Federal
15 judge believes should have happened.

16 CHIEF JUSTICE ROBERTS: Where is --

17 MR. HAWKINS: To the extent --

18 CHIEF JUSTICE ROBERTS: Where is all that
19 that you just read, that they're bound by all these
20 things? Where do I find that?

21 JUSTICE KENNEDY: It's 3621(b). Is it cited
22 in any of your briefs? Or pardon me. Is 3621(b) set
23 forth in any of the materials?

24 I have it in front of me, but I -- is it
25 in the Government's brief or --

1 MR. HAWKINS: Your Honor, I believe it is
2 in -- in the Solicitor General's -- in the appendix to
3 the Solicitor General's brief, Your Honor.

4 CHIEF JUSTICE ROBERTS: Well, I'm looking
5 at -- I guess I got this off -- somebody got this off
6 line for me. I'm looking at the program statement of
7 the Bureau of Prisons. And it says what the regional
8 directors are supposed to look at is the intent of the
9 Federal sentencing court or the goals of the criminal
10 justice system.

11 So, you've got some guy deciding whether the
12 goals of the criminal justice system require this person
13 to serve an extra 10 years or not.

14 MR. HAWKINS: Well, Your Honor, I think that
15 what the -- the law requires is that the Bureau of
16 Prisons has to look at these factors under 3621(b), and
17 those program statements are trying to define what those
18 exact factors are.

19 CHIEF JUSTICE ROBERTS: I mean, doesn't it
20 seem strange to you that a Federal bureaucrat sitting --
21 a regional director -- and I guess there are about a
22 half dozen of them -- sits somewhere and decides whether
23 a defendant -- say there's a 10-year Federal sentence, a
24 10-year State sentence, and that person says, well, I
25 think he ought to serve another 10 years, or I think

1 he's done.

2 MR. HAWKINS: Well, Your Honor, to -- to be
3 clear, I mean, Mr. Setser is going to have to serve a
4 151 -- a 151-month term of imprisonment no matter what.
5 But the bureaucrat that -- that you're talking about,
6 the bureaucrat will be -- only be making that
7 determination after having the complete information
8 which the Federal judge --

9 CHIEF JUSTICE ROBERTS: Well, I know, but --
10 but it's a big deal to be sentenced to, in my
11 hypothetical, another 10 years in prison. I don't care
12 how much information the bureaucrat has.

13 MR. HAWKINS: Well, Your Honor, but still
14 that -- that person has the -- has the information
15 before it, and it's also subject to judicial review
16 under 2241. I would point out that there is a process
17 where the petitioner can -- or the prisoner can ask for
18 this --

19 JUSTICE SOTOMAYOR: Well, it's judicial
20 review of what? Not of the -- not of whether that was
21 the desire of the State court or not. Judicial review
22 as to whether they abused their discretion.

23 MR. HAWKINS: Yes, Your Honor. And I
24 believe that's -- that's the same discretion that the
25 court has when its deciding a sentence on direct appeal.

1 JUSTICE SOTOMAYOR: So, you're going to make
2 a bureaucrat equal to a judge in making the most
3 important decision that a defendant faces: how much
4 time he should spend in jail. So, a bureaucrat, rather
5 than a judge, decides whether he's going to tack on a
6 year and a half, 5, or 10, or whether he's going to let
7 the defendant serve it concurrently?

8 MR. HAWKINS: Your Honor, again, it -- it's
9 not the who for us, but the when. And --

10 JUSTICE SOTOMAYOR: It's not a -- it's not a
11 who or when, because the State court judge's
12 recommendation is not binding on BOP. It has said that
13 repeatedly, hasn't it?

14 MR. HAWKINS: Your Honor, I'm aware of no --

15 JUSTICE SOTOMAYOR: Just answer that
16 question. Hasn't BOP said that a State court
17 recommendation is not binding on it?

18 MR. HAWKINS: That -- that is correct, Your
19 Honor. But I would point to the fact that -- what that
20 -- I mean -- I guess --

21 JUSTICE SOTOMAYOR: So, it can't be just who
22 -- it can't be just when. It's who's going to make the
23 decision.

24 MR. HAWKINS: Well, yes, Your Honor. But
25 the bureaucrat at least has all the information before

1 it. And if we go to look to --

2 JUSTICE SCALIA: Well, isn't it true that
3 the bureaucrat used to make that decision not too long
4 ago?

5 MR. HAWKINS: Yes, Your Honor.

6 JUSTICE SCALIA: When we had a parole
7 system. Before we had the sentencing guidelines, it was
8 up to the Bureau of Prisons whether to give parole or
9 not, right?

10 MR. HAWKINS: Yes, Your Honor.

11 JUSTICE SCALIA: Some bureaucrat in the
12 Bureau of Prisons, I guess.

13 MR. HAWKINS: Yes, Your Honor, along with
14 good time credits --

15 JUSTICE SCALIA: It's not unthinkable.

16 MR. HAWKINS: No, Your Honor, prior to the
17 passage of the SRA, the --

18 JUSTICE SOTOMAYOR: But wasn't the SRA
19 passed and this provision passed in part to take that
20 decision away from the bureaucrat?

21 MR. HAWKINS: Well, it was a -- it was
22 passed to take the decision away from the bureaucrat,
23 that the courts could not order a Federal sentence to
24 run concurrently with an undischarged State term of
25 imprisonment. That gave that power back to the court,

1 but --

2 JUSTICE SOTOMAYOR: Well, let's answer
3 Justice Scalia's point. Wasn't the SRA passed in part
4 because of the dissatisfaction with the fact that the
5 parole board used to make this decision, and they wanted
6 to put it back in the hands of judges?

7 MR. HAWKINS: Well, that's part of the
8 reason, Your Honor, but in passage of 3621, it also
9 highlighted the fact that it was not seeking to take
10 away the bureaucratic authority that the Bureau of
11 Prisons have for designation. And back to the --

12 JUSTICE SOTOMAYOR: I don't know why it
13 takes away from them on that score. They can choose
14 whatever facility they want within the constraints
15 imposed by a judge in terms of the length of the
16 sentence.

17 MR. HAWKINS: Well, I mean -- I guess, yes,
18 Your Honor, that is part of it, but that only comes into
19 play when the first sentence does not apply and when the
20 court does not have the requisite information. In our
21 estimation, it is better for the latter sentencing
22 entity, that with the most sentencing information, to be
23 able to make this -- this ultimate determination in --
24 in looking at the Federal court's views, versus allowing
25 a Federal judge who's prognosticating about what the

1 sentence might be and issue a binding order.

2 And if there are no further questions, I'll
3 reserve the remainder of my rebuttal time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Jay.

6 ORAL ARGUMENT OF WILLIAM M. JAY

7 ON BEHALF OF THE RESPONDENT,

8 IN SUPPORT OF THE PETITIONER

9 MR. JAY: Mr. Chief Justice, and may it
10 please the Court:

11 Federal district courts do decide how long a
12 defendant should be in prison for his Federal crime, but
13 for many years, both before and after the Sentencing
14 Reform Act, the Attorney General through the Bureau of
15 Prisons has decided where the sentence will be served
16 and when it shall commence.

17 JUSTICE SCALIA: I'm not clear on what the
18 -- what the Government's view of, whatever you want to
19 call it, inherent judicial sentencing power is. You --
20 you -- before section 3584 was passed, there -- there
21 was the power on the part of the Federal courts to
22 decide whether sentences should run concurrently or
23 sequentially, right?

24 MR. JAY: Not with a State sentence, Your
25 Honor. Before section 3584(a) was passed, a Federal

1 district court had no authority to specify that its
2 Federal sentence should run concurrently with a State
3 sentence that the defendant was already serving.

4 JUSTICE SCALIA: How do you know?

5 MR. JAY: Well, that's --

6 JUSTICE SCALIA: I mean, it did not -- what
7 authority it did have did not come from a statute,
8 right?

9 MR. JAY: Well, if it had had such
10 authority, Justice Scalia, it would have overridden the
11 Attorney General's authority. That's why we know it
12 didn't have it. That's why the --

13 JUSTICE SCALIA: Where is the Attorney
14 General's authority prescribed?

15 MR. JAY: The Attorney General's
16 authority --

17 JUSTICE SCALIA: His authority to say where
18 the sentence will be served?

19 MR. JAY: Precisely, Justice Scalia.

20 JUSTICE SCALIA: Oh, that's -- that seems to
21 be quite --

22 JUSTICE BREYER: If you look that up --

23 JUSTICE SCALIA: -- quite fanciful.

24 JUSTICE BREYER: It's pretty interesting,
25 because I did go back and look at the '79 Senate report

1 on S.1, which was the whole reform from beginning to
2 end, and my reading of that section suggests to me that
3 they thought past practice was exactly what they wrote
4 in this statute. All right. Now -- at least that's how
5 I read it. Maybe I didn't read it carefully enough.
6 But I thought they were thinking that the Federal judge
7 does have the power to sentence concurrently or
8 consecutively with a term that a Federal court or a
9 State court has imposed in the past, but -- but you
10 can't do this monkey business that they're -- I agree
11 with you on that.

12 There was nothing about trying to make
13 something concurrent or consecutive with a -- a State
14 term that hasn't yet been imposed. You couldn't do it;
15 you can't do it; it just gets into a -- at least not
16 with a consecutive.

17 MR. JAY: Well, let me see if I can answer
18 both Justice Scalia and Justice Breyer. There are cases
19 that we cite at page 16 of our reply brief. Those same
20 cases, Justice Breyer, you may want to look at the
21 Senate report on the -- on what actually became section
22 3584, page 126 -- sorry -- page 127 and note 314, which
23 says that it changes the law. It recognized that the
24 law -- specifically citing a Ninth Circuit decision,
25 which we also cite in our brief, because the Attorney

1 General has the authority to designate any facility,
2 Federal or State, and that's -- that is carried forward
3 today in section 3621(b). Because the Attorney General
4 has the authority to designate any such facility, a
5 Federal court before the passage of section 3584(a) had
6 no authority to order that the Federal sentence commence
7 right away and that the defendant be allowed to serve it
8 while also serving his -- State sentence.

9 JUSTICE GINSBURG: He could recommend it.
10 He could recommend it, could he not?

11 MR. JAY: Absolutely, Justice Ginsburg. He
12 could recommend it, just as he can today. And --

13 CHIEF JUSTICE ROBERTS: You said Federal or
14 State. Where does it say that in 3621?

15 MR. JAY: Section 3621(b), Your Honor. If
16 you look at subsection (b) --

17 CHIEF JUSTICE ROBERTS: Yes.

18 MR. JAY: -- the second sentence, "the
19 Bureau may designate any available penal or correctional
20 facility" -- skip forward a little bit -- "whether
21 maintained by the Federal Government or otherwise."

22 JUSTICE KENNEDY: In other words, what the
23 statute does -- it's phrased in terms of place, but it
24 really has consequences as to time. Einstein would have
25 loved it: You can't define space without time.

1 (Laughter.)

2 JUSTICE KENNEDY: But -- but I take it that
3 it can also be retroactive. If you have a prisoner who
4 has served -- has been sentenced in the Federal system,
5 then goes to the State and is serving in a State
6 facility, he then comes back to the BOP, the BOP can
7 retroactively say we designate the place of imprisonment
8 for the last 3 years as that State prison where you've
9 been serving and we credit you with time served; is that
10 the way it works?

11 MR. JAY: That is how it works.

12 JUSTICE SCALIA: Nunc pro tunc, right?

13 JUSTICE KENNEDY: That -- that's an amazing
14 interpretation.

15 JUSTICE SCALIA: And you get that out of
16 this -- this lean language here?

17 JUSTICE KENNEDY: That's an amazing
18 interpretation of the statute, but I understand that
19 that's the way it's being done.

20 MR. JAY: That is the way it's being done,
21 Justice Kennedy. Indeed, every time the bureau
22 designates a Federal prison or a State prison, it's
23 after the person comes into Federal custody, except in
24 cases where the person voluntarily surrenders.

25 CHIEF JUSTICE ROBERTS: Or -- or what if

1 it's a situation where he goes into one of these prisons
2 that are run by a private entity, right? It says
3 whether the Federal Government or otherwise, right? And
4 so, maybe the Federal Government -- I don't know how
5 often it might do it -- they -- you use facilities that
6 are privately run, right?

7 MR. JAY: Privately run --

8 CHIEF JUSTICE ROBERTS: Okay. So, why --

9 MR. JAY: -- State facilities, Federal
10 facilities.

11 CHIEF JUSTICE ROBERTS: -- isn't that what
12 they meant when they said "whether maintained by the
13 Federal Government or otherwise"? I think if they
14 wanted to say State or Federal, that's what they would
15 have said.

16 MR. JAY: Mr. Chief Justice, Federal
17 inmates, since the passage of the first Federal crime in
18 1790, have served their time in State prisons. There
19 were no Federal penitentiaries for more than 100 years.
20 The attorney -- service of a Federal sentence in State
21 prison was the norm, even after the construction of --
22 of Federal penitentiaries.

23 JUSTICE ALITO: It seems to me that the
24 question of how long someone should spend in prison,
25 which is what's involved in determining whether --

1 deciding whether a sentence is going to be served
2 consecutively or concurrently, is very different from
3 determining where the sentence is going to be -- where a
4 sentence is going to be served.

5 Isn't this a very strange reading of -- of
6 3621, to say that that grants the BOP the authority to
7 make this concurrent/consecutive determination?

8 MR. JAY: I don't think so at all, Justice
9 Alito. Let me give two reasons why. The first is that
10 before section 3584 was enacted, this -- the predecessor
11 of this statute, which was section 4082, was the reason
12 that Federal courts recognized that they didn't have the
13 power to prescribe concurrent treatment of a Federal
14 sentence with a previously existing State sentence.
15 That's one point.

16 The second point is, as Mr. Hawkins
17 mentioned, the quantum of Federal punishment, a
18 punishment for the Federal offense, that's up to the
19 Federal district judge to prescribe; but where -- where
20 that time will be served and whether the time has to
21 commence before, after, or during the defendant's
22 service of another sentence, that's a where and when
23 question. And where and when questions have always been
24 up to the Attorney General.

25 JUSTICE KAGAN: Mr. Jay?

1 MR. JAY: Yes.

2 JUSTICE KAGAN: Can I -- can I take you back
3 to 3584? So, 3584 talks about these two situations,
4 simultaneously imposed terms and undischarged terms, and
5 let's assume that all three sentences talk about only
6 those two situations. The premise of your argument is
7 that, in talking about those two situations, Congress
8 rejected judicial authority when it came to a third
9 situation. And I guess I want to find out from you why
10 that is. I mean, I want to stipulate, I guess, that
11 nobody had this third situation in mind. The third
12 situation is a very uncommon situation. And so, just
13 assume with me that Congress simply just wasn't thinking
14 about this third situation. That's an assumption of the
15 question.

16 What should we do, then? Why would we treat
17 this as exclusive?

18 MR. JAY: Well, I will -- I will assume with
19 you, Justice Kagan, although you know that I disagree,
20 that the -- that this is conscious. But two points:
21 First, there was no inherent authority beforehand. So,
22 Congress couldn't have been carrying forward existing
23 practice, because, as I've said, there was no inherent
24 authority for district courts to make this decision
25 before.

1 JUSTICE KAGAN: Well, let's just say
2 Congress just didn't know. It was not on Congress's
3 radar screen. Why would we treat this as exclusive as
4 to this third situation?

5 MR. JAY: You would do it this way because
6 the -- because the limitations are so clear and because,
7 as Mr. Hawkins said, there's a universe with sort of
8 three possible relationships. Either the Federal term
9 comes before the State term, after the State term, or
10 two Federal sentences can come at the same time. So,
11 Congress prescribed very carefully that if one of those
12 or if the second of those is met, then the terms may run
13 concurrently or consecutively. But by allowing the
14 third, the only other possibility --

15 JUSTICE KAGAN: Well, now you're battling my
16 assumption. You're suggesting that Congress must have
17 had this third situation in mind. But I'm saying, no,
18 the third situation is peculiar, and Congress didn't
19 have it in mind. Then what?

20 MR. JAY: Well, its peculiarity, Justice
21 Kagan, doesn't take away from the fact that if you let
22 this situation in, then the limitations have no meaning,
23 because if -- you know, if --

24 JUSTICE BREYER: You're talking
25 linguistically, but I thought one Congress probably did

1 have it in mind. I agree with you about that. But
2 leave that out. How do you do it? You are a Federal
3 judge. The point of the Federal guideline is to create
4 a sentence with qualifications that reflects the real
5 conduct in the world that the defendant engaged in. All
6 right? So, we work that out. That's now 3 years.

7 Now, our problem is that the State judge may
8 eat up some of that 3 years or may make the sentence
9 concurrent when it should be consecutive, because the
10 conduct's different. So, I, the Federal judge, say:
11 You are convicted of a drug crime; you get 3 years. I
12 know there's a question here about whether there's a
13 separate gun crime. That's State. Now, I want these 3
14 years to run consecutive with the State conviction for a
15 separate behavior. Okay? Now, that's what I want.

16 Now, if it's in the past, the State
17 sentence, I can do it. But where it hasn't been
18 happening yet, how do I do it? I say I want it
19 consecutive, but the State court judge who later will
20 have control of the case can say: I put my extra 2
21 years and make it concurrent with the State sentence.

22 You see? It's a problem. It's a practical
23 problem. Now, maybe I'm wrong in what I've just said,
24 which is why I said it, because I'm prepared to have you
25 tell me I'm wrong, there is no practical problem. But I

1 want to hear it.

2 MR. JAY: It's not a practical problem,
3 Justice Breyer, for a couple of reasons.

4 (Laughter.)

5 JUSTICE BREYER: All right. Good.

6 MR. JAY: Number one --

7 JUSTICE BREYER: That's why I asked.

8 MR. JAY: Number one, the judge doesn't
9 know -- you asked -- you asked us to assume that there
10 has been a conviction in the State, maybe just not --

11 JUSTICE BREYER: No --

12 MR. JAY: Maybe just not --

13 JUSTICE BREYER: There has not been a
14 conviction.

15 MR. JAY: That just highlights my point.
16 There hasn't been a conviction yet, let alone a
17 sentence. There may never be a conviction, and -- but
18 if the judge wants to guard against that eventuality,
19 the judge can make a recommendation. And there are two
20 salutary things about making a recommendation rather
21 than a judgment.

22 JUSTICE BREYER: How does the judge stop the
23 State court judge later from making his conviction for a
24 separate form of behavior run concurrently with the
25 Federal sentence? How does he stop that? What power

1 does he have over State courts?

2 MR. JAY: I don't think I or either of my
3 friends who are going to argue today or -- are
4 suggesting that the Federal judge has power to order the
5 State court not to do something.

6 JUSTICE BREYER: Correct. Then how can he
7 stop it?

8 MR. JAY: Well, the way that sovereigns work
9 out who gets to punish defendants --

10 JUSTICE BREYER: My point --

11 MR. JAY: -- if they both want to punish --

12 JUSTICE BREYER: You may have missed my
13 point. My point is because he can't stop it is why
14 you're right in this case.

15 MR. JAY: I am delighted to hear that you
16 think we're right, Justice Breyer. But --

17 (Laughter.)

18 MR. JAY: But I want to -- I do want to give
19 you an answer to your question about why this is not a
20 practical problem. The Federal judge can give -- can
21 make a recommendation that says if he's convicted and if
22 he's sentenced to a particular term in the State court,
23 I recommend that the Bureau of Prisons not let him serve
24 them -- concurrently.

25 CHIEF JUSTICE ROBERTS: So that -- so that

1 20 years later after the defendant has served his
2 mandatory minimum sentence, your friend in the Bureau of
3 Prisons regional office is supposed to go look back and
4 see what the judge said 20 years ago?

5 MR. JAY: Judges make recommendations all
6 the time, Mr. Chief Justice. They -- there is a section
7 of the --

8 CHIEF JUSTICE ROBERTS: I don't think that
9 is responsive to the point I just made, that they make
10 recommendations all the time. I'm talking about the
11 effectiveness of the recommendation 20 years later.

12 MR. JAY: As the Court is aware, the
13 Administrative Office's standard form for the judgment
14 in a criminal case allows the judge to make
15 recommendations to the Bureau of Prisons. So, this will
16 be in the judgment, the very judgment that the Bureau of
17 Prisons will be looking at, whether it's a week later or
18 20 years later. And if --

19 JUSTICE GINSBURG: Mr. Jay, what does the
20 "or" mean? Maybe the judge -- it was 20 years ago;
21 maybe the judge said nothing. Nevertheless, it's: What
22 was the intent of the sentencing court or the goals of
23 the criminal justice system?

24 MR. JAY: Your Honor is reading from the
25 Bureau of Prisons policy statement.

1 JUSTICE GINSBURG: Uh-huh.

2 MR. JAY: If you go on in that policy
3 statement, it alludes to other considerations that the
4 bureau looks at. And what that maps onto is the factors
5 in section 3621(b). And I can represent to the Court
6 that when -- when the -- when an inmate asks for
7 concurrent treatment in this fashion, the bureau's
8 central facility for designation and sentence
9 computation goes through those factors in an
10 individualized way and makes a -- makes a decision.
11 That then is reviewable.

12 JUSTICE SOTOMAYOR: Mr. Jay --

13 JUSTICE GINSBURG: Do they take -- do they
14 take account of the -- the defendant's behavior in the
15 State facility? Is that a factor?

16 MR. JAY: It can -- in Federal or State
17 custody, Justice Ginsburg, it may be a factor. Yes.

18 JUSTICE GINSBURG: Which is something that
19 the judge couldn't know.

20 MR. JAY: That -- that's certainly correct.
21 And on the flip side is that if the defendant has
22 behaved in an exemplary way, then either the judge --
23 the judge may indeed change his recommendation. We've
24 cited a case in our brief where the -- where a judge --

25 JUSTICE SCALIA: I thought we tried to get

1 rid of all of that when we abolished the parole system.
2 I thought we tried to take away from the bureaucrats the
3 decision to let somebody out earlier because he's been a
4 good boy and hold him longer because he hasn't.

5 MR. JAY: Mr. Setser has been sentenced to
6 151 months for his Federal crime. Nothing the Attorney
7 General does is going to shorten that in a way not
8 authorized by statute. It's not -- it doesn't make the
9 sentence an indeterminant one. It's about where he's
10 going to serve it.

11 CHIEF JUSTICE ROBERTS: I suppose --

12 JUSTICE SOTOMAYOR: Mr. Jay, there is some
13 force to your -- to Petitioner's argument that
14 federalism should be respected, that Federal courts and
15 the State judges and their individual wishes should be
16 respected and followed by BOP actually. The system
17 you're proposing actually takes away from both Federal
18 judges control over the sentencing decision.

19 If Federal judges recommend the consecutive
20 sentence, then the State judge can take that into
21 account in setting how much time they think is warranted
22 for their crime in addition or different from, and the
23 judge -- if he wants it to run concurrently the way
24 Justice Breyer said, he could just give a zero. He
25 knows what the Federal judge wants.

1 CHIEF JUSTICE ROBERTS: You may answer
2 briefly.

3 JUSTICE SOTOMAYOR: The bottom line --

4 MR. JAY: Thank you, Mr. Chief Justice.
5 The -- the State judge can still know what
6 the Federal judge recommends. If it's not -- it just
7 won't be binding under our view of the statute. And in
8 any event, having the -- the second decisionmaker make
9 the decision armed with all the information is still
10 preferable to having a premature determination locked
11 in, in a judgment.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. JAY: Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Mr. Young.

15 ORAL ARGUMENT OF EVAN A. YOUNG

16 ON BEHALF OF AMICUS CURIAE,

17 IN SUPPORT OF THE JUDGMENT BELOW

18 MR. YOUNG: Mr. Chief Justice, and may it
19 please the Court:

20 As this Court stated nearly a century ago in
21 *Ex parte United States*, under our constitutional system
22 the right to impose the punishment provided by law is
23 judicial.

24 Congress does not transfer such core
25 authority from one branch to another without clearly and

1 expressly saying so. Neither section 3584 nor any other
2 provision of the Sentencing Reform Act even remotely
3 approaches the clarity that Congress would use if it
4 intended to restrict judicial sentencing in cases like
5 Setser's.

6 JUSTICE SCALIA: The Government says that
7 the Federal courts never had that power anyway, so that
8 nothing is being restricted. And they contest the cases
9 that you've cited as demonstrating the existence of that
10 power in the situation involved here to -- to determine
11 whether a future -- a sentence to be imposed in the
12 future by State courts will be concurrent or consecutive
13 with the Federal one.

14 MR. YOUNG: Against -- that is wrong,
15 because against a number of cases that we cite -- and I
16 would commend them to the Court -- in which Federal
17 judges previous to the Sentencing Reform Act
18 anticipatorily sentenced, the Government and Mr. Setser
19 have provided zero cases before the Sentencing Reform --

20 JUSTICE BREYER: Nobody found that out in
21 1980 -- in 1980 or '79. If you look through the Senate
22 report on that, they don't refer to any of those cases.
23 They write it as if it was just as Justice Scalia and
24 the -- and the Government said.

25 And, honestly, my question really is the

1 same one -- maybe I didn't put it clearly, but I think
2 you understood it -- that the reason that they want the
3 Federal judge to be able to shape his sentence in light
4 of other sentences that either the Federal courts or the
5 State courts have given in the past is because you can
6 do it so that a single behavior gets a single sentence
7 and a different behavior is going to be sentenced
8 consecutively, presumptively.

9 But you just can't do that where the State
10 court hasn't yet acted, because -- at least you can't do
11 it in the consecutive case, because the State court
12 judge sees what you did, and he may decide: I don't
13 want it to be consecutive. So, here I am; I write in my
14 sentence to be served concurrently with the Federal
15 court sentence.

16 Now, you can have every agency you want in
17 the Federal Government, but there's no way to get around
18 that. You can't force that State judge to do something
19 different, and you can't muck around with your Federal
20 sentence in a way that will make it consecutive to a
21 State court sentence that says it's going to run
22 concurrent.

23 So, there's a practical problem, and that's
24 why it's left out. It's quite -- I mean, when I
25 finished reading it, I thought this is very logical.

1 MR. YOUNG: Your Honor, I think --

2 JUSTICE BREYER: Can you tell me what the
3 answer to that is?

4 MR. YOUNG: I think the answer is that it
5 turns much more on the order of imprisonment than the
6 order of sentencing, because the Federal court in Mr.
7 Setser's case, for instance, is imposing no obligation
8 whatsoever on the State. The State imprisoned first --

9 JUSTICE BREYER: I don't deny that there are
10 many instances where you could get it to work,
11 particularly where you're going concurrent. I do deny
12 that there's -- it's all smooth sailing. There are a
13 lot of cases you can't get it to work. I don't want to
14 repeat myself again. I've given you the example. I
15 gave him the example. And I want to know how you would
16 overcome that could be quite common situation where the
17 State judge hasn't done it yet; so, there's no way to
18 require the Federal court sentence to be served
19 consecutively, if the State judge decides it shouldn't
20 be.

21 MR. YOUNG: Well, let's take this very case,
22 for instance. Mr. Setser was sentenced in Federal court
23 first, and the Federal court said: I see that there is
24 coming a State probation revocation. I want this
25 Federal sentence, which will be served last, to have no

1 credit for whatever happens in State court.

2 JUSTICE BREYER: He can do that.

3 MR. YOUNG: And that's all he did do.

4 JUSTICE BREYER: Oh, I know.

5 MR. YOUNG: That's all that matters --

6 JUSTICE BREYER: I don't deny there can be
7 some. I say there is a concern that if he were to say
8 in a different case, I want the gun thing which is going
9 to State court to be consecutive, that he can't control
10 that. Because the State court judge could say I want my
11 gun sentence, State, to run concurrently with Federal.

12 MR. YOUNG: What the State judge could not
13 do is to say I want this State sentence, which is going
14 to be served first, to run concurrent to the
15 later-served Federal sentence. Because that would
16 require the Federal sovereign to let someone go.

17 JUSTICE BREYER: Oh, well, now we're getting
18 awfully complicated.

19 JUSTICE KAGAN: Mr. Young --

20 JUSTICE SOTOMAYOR: Actually, it becomes
21 easier than that. The State court can't force the
22 Federal Bureau of Prisons to take the prisoner back,
23 correct?

24 MR. YOUNG: Can't force the Federal Bureau
25 of Prisons to do anything. Release --

1 JUSTICE SOTOMAYOR: Exactly. And so, all it
2 can do is sentence the defendant to whatever time it's
3 going to sentence the defendant. The defendant serves
4 that time. Then the Federal sovereign takes over and
5 does whatever the Federal judge said.

6 MR. YOUNG: Precisely, and --

7 JUSTICE SOTOMAYOR: Runs it consecutively or
8 concurrently. Whatever the Federal judge said controls
9 in every situation.

10 MR. YOUNG: The Bureau of Prisons can
11 effectuate that order very easily once that's happened.

12 JUSTICE KAGAN: Mr. Young, the Government
13 says that there are three situations in which this
14 consecutive/concurrent problem comes up. This statute
15 deals with two of them. And the Government wants --
16 argues that in dealing with two of them, it impliedly
17 stated a rule on the third. What's the best argument --
18 what's your best argument against that?

19 MR. YOUNG: I think the best argument is
20 that the statute plainly does not withdraw any
21 authority. It doesn't describe it at all. What the
22 statute does -- in --

23 JUSTICE KAGAN: Well, I think that that's
24 not right. It seems to me that the first sentence of
25 this statute grants authority to the courts in these two

1 situations. And the second and third say what happens
2 when that authority isn't exercised. The question I'm
3 struggling with -- and it's the same question I put to
4 Mr. Jay -- is why we should think that the grant of
5 authority over situation A and situation B is a denial
6 of authority over situation C? So, what's your best
7 argument?

8 MR. YOUNG: Well, my best argument, assuming
9 the premise that it's a grant, which I think is not the
10 best way to read it, but if it's a grant of authority,
11 still the correct answer is it says nothing at all about
12 the anticipatory context. And Congress must speak
13 clearly if it will withdraw power from the courts.

14 JUSTICE GINSBURG: Well, it does to this
15 extent: If it's two -- if the second sentence that
16 hasn't yet been imposed, but there's an indictment in
17 another Federal court, if there's two consecutive
18 prosecutions, the first judge can't say I want my
19 sentence to run consecutive to the one that may or may
20 not be imposed by another Federal judge. That would not
21 be possible, right?

22 MR. YOUNG: I think it would not be
23 possible.

24 JUSTICE GINSBURG: So, why should it -- if
25 the order is one way for successive Federal

1 prosecutions, why should it be different when the second
2 prosecution, instead of being Federal, is State?

3 MR. YOUNG: For several reasons, one of
4 which is -- I think it ties into Justice Breyer's
5 question. If the Federal judge sentences first and
6 imprisons first, it could not impose a consecutive or
7 concurrent term as to the later-served State sentence
8 either. The first imposed Federal sentence will
9 presumably be served first in the same Bureau of
10 Prisons. And so, there's nothing for it yet to be
11 consecutive or concurrent to.

12 A second answer is that all Federal
13 sentences are served under the jailer of the same
14 sovereign, the Federal; whereas in the anticipatory
15 context, we have two different systems. And so, the
16 first sentencing federal judge is the only judge that
17 can compel the jailer of the Federal sovereign to either
18 credit or not to credit; whereas in the Federal/Federal
19 system, under the statute, the second judge is
20 explicitly given the power to alter the default rule.
21 So, in all Federal cases, either a default rule or a
22 judge will determine whether or not a credit should be
23 given to the defendant.

24 JUSTICE GINSBURG: But it will be the second
25 judge.

1 MR. YOUNG: The second Federal judge can do
2 it, but the second State judge cannot, because this
3 statute can neither empower the State judge --

4 JUSTICE GINSBURG: But the State judge can
5 decide what's going to happen to the second sentence.

6 MR. YOUNG: If the second sentence is served
7 second. But as in this case and many others, the second
8 sentence is served first. And, consequently, the second
9 sentencing judge, the State judge in Mr. Setser's case,
10 has no power to determine whether or not that sentence,
11 which will be served first, will be consecutive or
12 concurrent.

13 JUSTICE GINSBURG: What do you do --

14 MR. YOUNG: And I know there's a lot of
15 firsts and seconds going on here, but the point is --

16 JUSTICE GINSBURG: But what do you do with
17 the -- the argument that the judge who anticipates a
18 second sentence may be wrong? He doesn't know what that
19 will be. And when I asked, how does the bureau make
20 these judgments -- does it take into account the conduct
21 of the prisoner in the State facility -- that's
22 something that the judge who sentences first can't
23 possibly know.

24 MR. YOUNG: It's true, but the same
25 prisoner -- if the State sentence had happened 10

1 minutes before the Federal sentence, the Federal judge
2 would have plenary authority to impose a consecutive
3 sentence, even though it would be served last. And all
4 of that conduct that will happen in the State system
5 would be irrelevant. The sentence happened at the time
6 of sentencing.

7 Now, there is a statutory provision that
8 does describe exactly how the Bureau of Prisons should
9 interact with the courts in the context of a sentence
10 that needs to be changed, and that's section 3582(c).
11 And in that statute, the -- the judge will remain the
12 decider because the Bureau of Prisons goes as a
13 petitioner and says to the court there are compelling
14 and extraordinary reasons to modify this sentence.

15 And then the court, always in the position
16 of the decider and using the section 3553(a) factors,
17 will decide whether or not the Bureau of Prisons'
18 petition should be granted. But never in any statute is
19 the Bureau of Prisons given the authority to use the
20 sentencing factors under section 3553.

21 And, in fact, the sentencing factors that
22 the Government contends would allow it to make a
23 sentencing determination under section 3621, page 2a of
24 the Government's merits brief, starts off with the very
25 preliminary requirement. And I'll read from the second

1 sentence of 3621(b): "The Bureau may designate any
2 available penal or correctional facility that meets
3 minimum standards of health and habitability established
4 by the Bureau." Which means that if this is the power
5 that the Bureau of Prisons has to make a sentence
6 concurrent, a State prisoner in a true hellhole would
7 not be able to get a concurrent sentence. The person
8 most in need of that judicial mercy would be precluded
9 by statute if we subject this statute to anything like
10 the textual rigor that the Government wants to subject
11 3584 to.

12 Plainly, what 3621(b) does is articulate a
13 set of principles that allows the Bureau of Prisons to
14 decide to which prisons defendants should go, not how
15 long they must stay there. That is an element of
16 punishment, which is quintessentially judicial. This
17 Court said in *Ex parte United States* -- it's been quoted
18 and cited by courts across this country for a hundred
19 years. And, in fact, in that case, it was said to be so
20 historically established that it hardly merited comment.
21 And now --

22 JUSTICE BREYER: Well, I'd be a little
23 worried in this case at deciding whether section -- what
24 is that section -- the place of imprisonment, section
25 3621(b), whether that does or does not give the power to

1 the Bureau of Prisons, the power that they've assumed
2 for many, many years. Do we have to decide that
3 question here? I didn't realize I was deciding that. I
4 thought I was just deciding whether -- whether the
5 judge, the sentencing judge, has the power to impose,
6 say, a consecutive sentence, say my sentence will run
7 consecutively to a State court sentence that has not yet
8 been imposed. I thought that was all I had to decide.

9 MR. YOUNG: That is all you have to decide,
10 but in so deciding, you're confronting the argument that
11 the Government makes which is: No, no; Congress has
12 exclusively vested this sentencing function in us.

13 JUSTICE BREYER: I don't think you have to.
14 I mean, maybe we do have to get to that.

15 JUSTICE SCALIA: Well, somebody has to make
16 that call.

17 MR. YOUNG: Should it be the judge or the
18 jailer?

19 JUSTICE SCALIA: I mean, if you say -- it's
20 either the judge or the jailer. There's nobody -- who
21 else is going to make it?

22 MR. YOUNG: That's precisely the point. And
23 the argument --

24 JUSTICE SCALIA: So, if you say the judge
25 can't, it's going to be the Bureau of Prisons.

1 MR. YOUNG: Precisely. And to say that
2 Congress has never given it to the Bureau of Prisons
3 necessarily means that it is the judge.

4 JUSTICE BREYER: Well, let me ask you this
5 then: Is it -- is it -- if we want the judge to be able
6 to say this particular prisoner will serve his Federal
7 sentence after the State gun sentence is served or,
8 alternatively, with the State gun sentence, the 3621
9 says that -- that the judge can, if that sentence, State
10 sentence, has not yet been imposed, we don't know what
11 it is -- we don't know if it will be imposed. We don't
12 know what they're going to say. We don't know whether
13 they're going to sentence him to -- count his time, time
14 served in the Federal jail. I mean, I don't know what
15 they're going to say in Federal prison.

16 But he can write down what he wants, as (4)
17 is "any statement by the court that imposed the
18 sentence." A statement "concerning the purposes for
19 which the sentence of imprisonment" has been imposed.
20 You would say I'm trying to get a single behavior
21 punished once with 4 years, and then that separate
22 behavior I would like punished by 2 years more. Okay?

23 So, you write it down and the Bureau of
24 Prisons follows it. And if they don't follow it, they
25 could get reversed by a district court, abuse of

1 discretion. Now, will that solve the problem.

2 MR. YOUNG: It doesn't, Your Honor, because
3 what that factor allows the Bureau of Prisons to do is
4 to decide, based upon the judgment here, is this someone
5 who needs to be in the super-max or is it someone that
6 can be in a much more minimum security type prison?

7 None of this has anything to do with the
8 determination of how long someone should spend in
9 prison, 10 years, 20 years. The Government says it's
10 all the same; you'll serve your Federal prison term. It
11 doesn't seem that from the perspective of an identically
12 situated person who will spend 20 years rather than 10
13 years of his life in prison.

14 JUSTICE SCALIA: Am -- am I correct, Mr.
15 Young, that if -- if the Federal sentencing judge is
16 erroneous in his prediction of what the State court
17 later sentencing will do, that his order, based upon
18 that erroneous prediction, can be altered upon appeal by
19 the Bureau of Prisons?

20 MR. YOUNG: That's correct. And the only
21 situation in which a prisoner would be harmed is if the
22 Federal judge says, I want it to be consecutive, and
23 then the Bureau of Prisons comes in later, 20 years
24 later after he is done with the State term, let's say,
25 and says, boy, we would have made this concurrent, and

1 here are all reasons why. Congress has provided a means
2 to do that, section 3582(c). Go to the Federal court as
3 the petitioner, not the decider. Congress did not
4 unilaterally give the Bureau of Prisons the power it is
5 now claiming. And so, for that reason --

6 CHIEF JUSTICE ROBERTS: I'm interested in
7 pursuing the point Justice Breyer raised. I am troubled
8 by the idea that someone in the Bureau of Prisons makes
9 this determination, but I -- I wonder how that -- how
10 that helps you.

11 You said it's either the jailer or the
12 judge, and, therefore, you do have to decide it. But
13 maybe it's either the first judge or the second judge.

14 MR. YOUNG: In -- in --

15 CHIEF JUSTICE ROBERTS: Why -- why isn't --
16 doesn't it make sense to say that the Federal court
17 doesn't -- whoever is second can always tailor their
18 sentence to what they want. Whoever is first just has
19 to give the sentence that he or she thinks is
20 appropriate.

21 MR. YOUNG: Because in the dual sovereignty
22 context, that second sentencing judge cannot compel the
23 Federal sovereign to either reduce --

24 CHIEF JUSTICE ROBERTS: Doesn't compel --
25 no, doesn't compel the Federal sovereign. He would say:

1 Look, I want to give 10 years.

2 MR. YOUNG: Right.

3 CHIEF JUSTICE ROBERTS: I see you've already
4 got, you know, a -- a 15-year sentence under the
5 Federal, but I don't want it to be 25 years. So, I'm
6 going to, in fact, just give you a 5-year sentence.

7 Do understand what I'm making --

8 MR. YOUNG: Yes.

9 CHIEF JUSTICE ROBERTS: Whoever the second
10 judge is can figure out exactly how long he thinks the
11 sentence should run and give a sentence accordingly.

12 MR. YOUNG: That cannot be the case if it's
13 a State court and the State court does not know, with
14 respect to a later-served Federal sentence, whether or
15 not the time will be credited. So, in other words, in
16 your example --

17 JUSTICE KENNEDY: Well, but I suppose in the
18 Chief's example a super-cautious State court judge would
19 say: I see you've got a 15-year sentence here. I don't
20 know if it's going to be concurrent or consecutive. So,
21 I'll sentence you to nothing at all.

22 I mean, I suppose -- which shows that
23 there -- if -- if you follow your rule, you may be
24 infringing on the Federal balance, but then you would
25 say the BOP can do the same thing.

1 MR. YOUNG: In the case in which the -- the
2 State judge says, I want it to be zero, then we know
3 that the State relinquishes its custody. And whatever
4 happens later in Federal prison, a pardon, let's say, or
5 a reversal, that's -- that's gone and done for the State
6 no longer has the claim on him. They've sentenced him
7 to zero.

8 If the State judge knows, however, that the
9 Federal court has sentenced someone to 5 years and it
10 will be consecutive because it's served last to whatever
11 the State judge imposes, the State judge now is in a
12 position, and only in that situation, is in a position
13 to say, okay, if I give you 2 years, you will spend 7,
14 because I know that the Federal sentence will be
15 consecutive.

16 On the other hand, if the curtain is only
17 pulled up by the Bureau of Prisons at the end and the
18 State judge says I want you to have 10 years, I'll
19 sentence you to 5, and the Bureau of Prisons pulls up
20 the curtain, it's concurrent. Then only 5 years has
21 been sentenced.

22 JUSTICE KENNEDY: Well, you're saying that
23 your position is really more consistent with the Federal
24 balance because it allows the State to know what it's
25 deal with?

1 MR. YOUNG: Precisely. The only way to
2 really respect the second sentencing State judge is to
3 provide clarity, rather than to force that State judge
4 to guess, to sentence in the dark, about what will
5 actually happen to this defendant later on when he
6 eventually, after State confinement, is transported to
7 the Federal prisons.

8 This case is only about that situation in
9 which the first sentence is imposed by the Federal
10 court, but before the Federal sentence is enforced, all
11 of the State -- that's why the Federal bookends, I
12 describe it. We start with the Federal sentence, and we
13 end with the imposition, the service of the Federal
14 service.

15 And in between those two things, the State
16 sentencing and imprisonment occurs. And so, the State
17 judge cannot make his sentence be concurrent or
18 consecutive to the Federal sentence, because the Federal
19 sentence hasn't been imposed yet. Consequently --
20 hasn't been served yet. Consequently, providing that
21 State judge with knowledge about what will happen is the
22 only way to give that State judge the respect the State
23 judge needs and requires to be able to implement State
24 goals in a meaningful way. Otherwise, it's a guess.

25 As you heard, the Bureau of Prisons does not

1 follow, as a matter of course, a second sentencing State
2 judge's preference that it be concurrent or consecutive.
3 That is something that the Bureau of Prisons, as
4 responsive to the Federal courts, Federal sovereign,
5 will decide based upon what happens in the Federal
6 court.

7 JUSTICE ALITO: This is perhaps something
8 that I should have asked the Solicitor General, but do
9 you have any idea how often this situation comes up?

10 MR. YOUNG: I don't have specific numbers.
11 It's difficult to find them, but I think it's
12 increasing. And the reason for that is the explosion of
13 Federal criminal law. There's still far more State and
14 local law enforcement officers in this country. And the
15 doctrine why these -- why these sentences can be imposed
16 first but served last is because of the primary custody
17 rule. Because a local or State law enforcement officer
18 will most likely arrest someone whose act will violate
19 the laws of both sovereigns, that person will be in
20 State custody.

21 We now have so many more offenses under the
22 Federal Criminal Code than we did even back when
23 Congress passed the Sentencing Reform Act, which goes,
24 perhaps, to Justice Kagan's point. Congress may not
25 really have been thinking about this at all.

1 JUSTICE KAGAN: So, is there evidence one
2 way or the other on that question, whether this
3 situation was in any meaningful sense before the
4 Congress?

5 MR. YOUNG: Everything is silent. I think
6 it was not. As to the question about whether courts
7 could impose concurrent consecutive sentences, what the
8 report says, footnotes 310, 314, 318, pages 126, 127,
9 and 129 of the sentencing report, there were some courts
10 that thought that a prior statute stopped them from
11 imposing only concurrent sentences in the dual
12 sovereignty context.

13 Congress made very clear -- in fact, it
14 cited by name *United States v. Segal*, one of the cases
15 the Government cites for this proposition, as being
16 incorrect. We want to make it clear, Congress says in a
17 report, you can impose concurrent sentences, but all
18 along consecutive sentences were imposed anticipatorily.

19 And so, this is sort of like, you know, the
20 rule that someone cannot have M&M's at all being held to
21 mean that you cannot have candy after dinner if you have
22 Snickers after dinner every night. Once you remove the
23 obstacle to having M&M's, then presumably you can have
24 them after dinner as well. There was no rule that you
25 couldn't have candy after dinner.

1 There was no rule that Federal courts could
2 not sentence anticipatorily. There was simply a
3 statutory bar that some courts thought stopped them from
4 imposing concurrent sentences in the dual sovereignty
5 context.

6 JUSTICE ALITO: Well, in order for you to
7 prevail, I think we -- is it correct, we would have to
8 determine that there was this authority inherent in the
9 judiciary prior to the enactment of this statute?

10 MR. YOUNG: I don't think that that is
11 necessarily true. I think it makes it much easier. And
12 there can be no question that concurrent and consecutive
13 sentencing is inherently and quintessentially judicial.
14 This court in Oregon v. Ice only two terms ago regarded
15 it that way.

16 JUSTICE ALITO: Yes, with respect to Federal
17 sentences, certainly that's true. But with respect to
18 Federal and State sentences, it may be, as you
19 suggested, that this just didn't come up very often
20 until the enactment probably of the Federal drug laws
21 and -- and a few other statutes that created offenses
22 where you have -- where the same conduct would
23 constitute a violation of both Federal and State law.
24 And so, you have this situation coming up with greater
25 frequency.

1 MR. YOUNG: That's true. With greater
2 frequency, it did happen, and the courts recognized this
3 and, without any concern, sentenced anticipatorily.

4 JUSTICE KAGAN: But -- but if one had -- you
5 know, what I take as the view of Justice Alito's
6 question is that there was no -- no practice supporting
7 courts sentencing in this way. It -- it just wasn't
8 done. Mostly, it wasn't on anybody's radar screen that
9 this was a significant issue. What would we do then, if
10 we thought Congress didn't speak to it, but we also
11 didn't see a past practice inconsistent with what the
12 Government is suggesting?

13 MR. YOUNG: In that case, if the choice is
14 between the judge and the jailer, I think the choice is
15 clear. If Congress did not specifically say that
16 something as quintessentially judicial as deciding how
17 long someone would spend in prison must be decided by
18 the executive branch, questionable whether it could, but
19 unless it explicitly said this is how we want it to
20 happen, there can be no doubt that imposing extra
21 punishment or withdrawing punishment is so judicial in
22 nature that, even if Congress didn't think about it and
23 explicitly address the problem, the tie certainly has to
24 go to the judge.

25 JUSTICE BREYER: No, it isn't a tie. It's

1 -- I mean, there's one thing on each side. On your side
2 is the fact that the sentencing judge, Federal, is
3 trying to figure out his own sentence, and he does --
4 either he does want or he doesn't want that particular
5 individual to serve additional time, should a State
6 court judge later decide on some related or unrelated
7 matter. All right?

8 And if that were all that was at issue, and
9 the choice is between his saying -- just doing it,
10 writing it in the sentence, or he's writing down his
11 reasons what he'd like to have happen and letting the
12 Bureau implement that as best they can under the section
13 we are talking about. That's on the one side. And that
14 says let the judge do it; don't give the implementation.

15 On the other side is to let the judge do it
16 risks complex interference with the second to sentence,
17 who is the State court judge.

18 It may be you're right that there's some way
19 of working it out, but it sounds complicated to me,
20 particularly in -- in the consecutive case.

21 So, we have federalism principles on one
22 hand, versus the judge, versus the bureaucracy on the
23 other. And so, it isn't so easy. That's -- that's why
24 I think this is not such an easy case.

25 MR. YOUNG: Well, let me address what the

1 anticipatory sentencing, the Federal judge, how he could
2 possibly interfere with the State. I don't think that
3 he can if the State is sentencing second and imprisoning
4 first.

5 JUSTICE BREYER: No, no. It's the State
6 court judge that wants to sentence a person to an
7 unrelated offense --

8 MR. YOUNG: Right.

9 JUSTICE BREYER: -- but he wants -- he
10 decides he wants it to run -- concurrently with the --
11 ongoing Federal sentence. There's no way to stop it.

12 MR. YOUNG: Well, the question -- that's --
13 that's the key point. If it's an ongoing Federal
14 sentence, I certainly agree. But the point here is his
15 Federal sentence hasn't begun. Setser doesn't begin to
16 serve --

17 JUSTICE BREYER: All right. Then you -- but
18 you can't break this thing down. Either they have the
19 power in the Federal district court under this
20 particular provision, with all its presumptions, to run
21 this mechanism, the one that's in the statute, in
22 respect to State court sentences that have not yet been
23 imposed or they do not have that power. We can't break
24 it down and say sometimes you have it, and sometimes you
25 don't.

1 MR. YOUNG: If the State court sentence has
2 not been imposed and will run second, a Federal court
3 can say consecutive or concurrent, but it wouldn't have
4 any meaning. Just as the State court, if it had tried
5 to bar the Federal Bureau of Prisons from keeping
6 someone, would have no meaning. There's nothing for it
7 to be consecutive or concurrent to, if it's the first
8 sentence being served.

9 And so, in -- in that regard, I think the
10 key point is a Federal court cannot say, I'm the first
11 judge to sentence and my sentence will immediately
12 begin; I want it to be consecutive to another State -- a
13 future State sentence. It wouldn't mean anything,
14 because the State would get that prisoner after he
15 satisfied his Federal term, and the State can do what it
16 wants. Let him go, keep him longer. That's the dual
17 sovereignty principle.

18 CHIEF JUSTICE ROBERTS: It can't -- it
19 can't if, for example, they're dealing with a mandatory
20 minimum. Right? If the State court judge has to
21 sentence the person to 10 years, then your explanation
22 falls apart.

23 MR. YOUNG: If State law has a particular
24 requirement as Federal law in some cases -- 924(c)
25 does -- then that's the way dual sovereignty works as

1 well. But there is never a situation in which a State
2 judge is worse off by having the knowledge of what the
3 Federal court will sentence -- has sentenced and how
4 that sentence will be imposed.

5 Again, if there's a problem with it, the
6 Bureau of Prisons has a way to solve it, and it's
7 through section 3582(c). It's not through a unilateral
8 determination, 20 years later perhaps, seeking the
9 advice of a judge. Maybe the advice of the judge is
10 provided at the time of sentencing. And if it can do
11 that, there's no reason why it couldn't be an order that
12 can be enforced rather than a piece of advice that is
13 given at the time of sentencing.

14 Judges decide how much punishment someone
15 should receive. In Federal court, Federal judges decide
16 how long someone should spend in the Federal Bureau of
17 Prisons. State courts can't do it, but they can adjust
18 sentences within the strictures of State law to account
19 for what they know is coming if Federal courts are able
20 to provide that advice.

21 And if they cannot decide that issue and
22 advise the State court judge of what will happen, then
23 there are situations that will occur when the Bureau of
24 Prisons administers these sentences, and there's no
25 question about that either. But the point is there is

1 never a situation in which a judge, able and willing --
2 able to follow the section 3553(a) factors and willing
3 to impose that sentence, is doing something that will be
4 worse for the defendant or worse for the States than if
5 he does not do it.

6 You contrast the -- the two situations that
7 two equally situated people would be in. On the one
8 hand, sentencing in open court by an Article III judge
9 subject to the section 3553(a) factors with direct
10 review in the courts for reasonableness. On the other
11 hand, sentencing by administrator without any of those
12 salutary procedural protections, without direct review
13 in the courts, and based on factors that determine to
14 which prison someone should go, not how long they must
15 stay there for purposes of punishment.

16 And for that reason alone, if for none
17 other, the Court should affirm the judgment because it
18 allows district judges, subject to their wise exercise
19 and sound exercise of discretion, to make these
20 sentences to clarify things upfront for everyone: the
21 defendant, the State courts, and the Bureau of Prisons.

22 Twenty years, this country has had half of
23 the circuits following this practice, and there's not
24 one case cited on the other side showing that any
25 mal-administration of justice has resulted, any lack of

1 clarity, any problems with respect to how these
2 sentences are enforced.

3 And that's because it does the opposite.
4 Allowing judges who are able, in cases like Setser's, no
5 matter how much time the State gives for probation
6 revocation, no Federal credit should be given to it. He
7 knows enough. He knows everything he needs to know to
8 make that sentence. He made it. It's effectuated by
9 the Bureau of Prisons. The Government has not said once
10 that it cannot enforce that sentence.

11 And to the extent that Setser wishes to
12 challenge how the Bureau of Prisons credits the State
13 order, the mechanism to do that is to exhaust his
14 administration -- administrative remedies in the BOP and
15 then seek judicial review to determine whether that
16 calculation was done rationally and fairly.

17 This appeal is not the place for that. This
18 appeal is to determine whether district courts never
19 have such authority.

20 I thank the Court.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Hawkins, you have 2 minutes remaining.

23 REBUTTAL ARGUMENT OF JASON D. HAWKINS

24 ON BEHALF OF THE PETITIONER

25 MR. HAWKINS: Thank you.

1 Justice Breyer, if I could go back to your
2 hypothetical, I think that the way that the Federal
3 judge can get this accomplished is simply by waiting.

4 After -- after the -- the conviction, Your
5 Honor, they can send a State prisoner back down to State
6 court, allow for that State sentence to be imposed, and
7 then he can come back into Federal custody. And in that
8 situation, that is when the court has the authority to
9 issue this binding order. That is the -- because it has
10 all of the information.

11 And -- and I would also --

12 JUSTICE SOTOMAYOR: That's preferable, to
13 clog the judicial system with untold number of Federal
14 convictions that have not been reduced to judgment?
15 That's preferable to giving judges or recognizing their
16 power to state their views up front?

17 MR. HAWKINS: Your Honor, the judge can
18 state the views -- her views up front in a
19 recommendation. It cannot do so if it doesn't know all
20 the facts. It cannot bind --

21 JUSTICE SOTOMAYOR: Could you tell me what
22 facts would affect the sentence here? The judge here
23 very clearly believed that some of the State charges
24 overlapped and some didn't. And so, it ran some
25 consecutive to one set of State charges and concurrent

1 to the other.

2 What are the facts with respect to the
3 defendant that the Federal court needed to know?

4 MR. HAWKINS: Your Honor, I think in looking
5 at 3584, it may well seem reasonable for the Federal
6 court to have done this, but the -- the fact is, is that
7 Congress drew a bright line, and he has to be subject to
8 this undischarged term of imprisonment.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. HAWKINS: Thank you.

11 CHIEF JUSTICE ROBERTS: The case is
12 submitted.

13 (Whereupon, at 11:05 a.m., the case in the
14 above-entitled matter was submitted.)

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